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SUPREME COURT, U.S.

IN THE
SUPREME COURT OF THE UNITED STATES

Term, 19

No. 78-6029

ANTHONY LaROCCA, JR.

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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Petitioner, Anthony LaRocca, Jr., prays that a Writ of Certiorari issue to review the Judgment on Rehearing of the United States Court of Appeals for the Third Circuit entered in this case on December 12, 1978 (Appendix "C").

Opinions Below

The Opinion and Order of the Trial Court (Appendix "A") is dated February 17, 1977 and, to the best of petitioner's knowledge, has not been printed by any official or unofficial reporter. The United States Court of Appeals for the Third Circuit filed an Opinion and Judgment on January 5, 1978 (Appendix "B"); and then on December 12, 1978, the United States Court of Appeals for the Third Circuit filed a Supplemental Opinion Sur Rehearing and Judgment (Appendix "C"). To the best of petitioner's knowledge, neither of the above Opinions of the Third Circuit Court of Appeals has been printed by any official or unofficial reporter.

Between the first and second Opinions filed by the Third Circuit, this Honorable Court decided the case of

Simpson, et al. v. United States, 435 U.S. 6, 55 L.Ed. 2770, 98 S.Ct. 909 (1978). Because Simpson addressed itself to the same question as the instant case, the Government petitioned for rehearing before the Lower Court, and after rehearing, the Lower Court again affirmed its original decision. Therefore, petitioner, Anthony LaRocca, Jr., files this Petition.

Jurisdiction

The Supplemental Opinion Sur Rehearing and Judgment of the United States Court of Appeals for the Third Circuit was entered on December 12, 1978 (Appendix "C"). This Petition for Writ of Certiorari was filed within thirty days.

Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Questions Presented

1. Did Congress authorize the additional penalty of 18 U.S.C. §924(c) for commission of an assault on federal officers when the underlying violation with firearms was already subject to an enhanced penalty under 18 U.S.C. §111?

2. As a matter of Double Jeopardy, are the offenses of an assault on federal officers with firearms and the use or carrying of firearms for an assault on federal officers sufficiently distinguishable to permit the imposition of cumulative punishment?

Constitutional and Statutory Provisions Involved

1. The United States Constitution, Fifth Amendment

> "No person . . . shall be subject for the same offense to be twice put in jeopardy of life or limb; . . . nor be deprived of life, liberty, or property, without due process of law; . . ."

2. 18 U.S.C. §924(c)

> "(c) Whoever
>
> (1) uses a firearm to commit any felony for which he may be prosecuted in a court of the United States, or
>
> (2) carries a firearm unlawfully during the commission of any felony for which he may be prosecuted in a court of the United States,
>
> shall, in addition to the punishment provided for the commission of such felony, be sentenced to a term of imprisonment for not less than one year nor more than ten years. In the case of his second or subsequent conviction under this subsection, such person shall be sentenced to a term of imprisonment for not less than two nor more than twenty-five years and, notwithstanding any other provision of law, the court shall not suspend the sentence in the case of a second or subsequent conviction of such person or give him a probationary sentence, nor shall the term of imprisonment imposed under this subsection run concurrently with any term of imprisonment imposed for the commission of such felony."

3. 18 U.S.C. §111

> "Whoever forcibly assaults, resists, opposes, impedes, intimidates, or interfers with any person designated in section 1114 of this title while engaged in or on account of the performance of his official duties, shall be fined not more than $5,000 or imprisoned not more than three years, or both
>
> Whoever, in the commission of any such acts uses a deadly or dangerous weapon, shall be fined not more than $10,000 or imprisoned not more than ten years, or both."

Statement of the Case

For simplicity, petitioner incorporates the summary of evidence contained in the Opinion of the United States Court of Appeals for the Third Circuit (Appendix "B"). Those portions of the Opinion discussing matters not material to the issues raised herein are omitted.

> "Michael Busic and Anthony La Rocca were involved in a conspiracy to distribute drugs which turned into an attempt to rob 'front money' from an undercover agent. This attempted robbery culminated in a shootout with federal agents.
>
> * * *
>
> "Charles D. Harvey, an agent of the Drug Enforcement Administration, first met Busic and La Rocca on May 7, 1976 at the home of Richard Hervaux, a government informant. At this time, defendants agreed with Harvey that Harvey would go to Florida to purchase drugs from one of the defendants' suppliers for re-distribution in the Pittsburgh area. (Tr. 21-22). Several days later, Harvey again met with the defendants and received samples

of the marijuana and cocaine which he was to purchase from defendants' Florida source. (Tr. 29-30.) The next day, after Harvey had arranged for his trip to Florida, La Rocca called him and insisted on seeing some 'front money'. A meeting was arranged for the following day in the parking lot of the Miracle Mile Shopping Center in Monroeville, Pennsylvania. (Tr. 32-33).

"As agreed, but having arranged for surveillance, Harvey went to the shopping center with $30,000 in cash. (Tr. 34-35). There he saw Busic and La Rocca in La Rocca's car. (Tr. 36). La Rocca entered Harvey's car, and the two drove to the other side of the parking lot. (Tr. 39). As Harvey removed the money from the trunk, La Rocca reached for his gun. Harvey ran, but La Rocca caught him and pointed his gun at Harvey's chest. Harvey then gave a pre-arranged signal to the surveillance agents. As the agents began to converge on the scene, La Rocca fired at Harvey, and missed. La Rocca then fired two shots at the vehicle containing agents William Alfree and William Petraitis, and two shots at the vehicle containing agent John Macready. (Tr. 40). He was immediately arrested and disarmed.

"Busic, who had been leaning on a nearby car during the shootout, was also arrested and disarmed, at which time he exclaimed, "Just remember that I didn't shoot at anybody and I didn't draw my gun." He was searched and a pistol was found in his belt; a search of La Rocca's car uncovered an attache case containing another pistol and a plastic box containing ammunition. (Tr. 41). When the car was further searched the following day, government agents found yet another pistol under the driver's seat and another box of ammunition in the glove compartment.

* * *

"The jury convicted defendants of conspiring to distribute drugs, unlawfully distributing narcotics, assaulting federal officers with a dangerous weapon, and receiving firearms while being convicted felons. In addition, each was convicted under a different subsection of 18 U.S.C. §924: La Rocca for having used (emphasis in the original) a firearm to commit the drug conspiracy and assaults on federal officers in violation of §924(c)(1); Busic for having carried (emphasis in the original) a firearm unlawfully during the commission of these felonies, in violation of 18 U.S.C. §924(c)(2). The sentencing judge imposed a five-year sentence on each defendant on the narcotics counts, five years on the assault with a dangerous weapon counts, and twenty years under the §924 counts -- all to run consecutively to each other -- for a total of 30 years for each defendant."

In the Supplemental Opinion Sur Rehearing, the Third Circuit rejected petition Busic's contention that, as a matter of statutory construction, 18 U.S.C. §924(c) did not apply in those cases where the penalty for the underlying felony was already enhanced for use of a dangerous weapon. The Lower Court held that Simpson does not proscribe the imposition of consecutive sentences under 18 U.S.C. §111 and 18 U.S.C. §924(c)(2). The judgment of sentence as to petitioner Busic was affirmed (Appendix "C").

As to defendant LaRocca, the Third Circuit, on the basis of this Court's decision in Simpson, remanded for resentencing. On remand, the Government may elect to proceed under either 18 U.S.C. §924(c)(1) or 18 U.S.C. §111, but not both.

Argument

There are three separate reasons why this Court should grant a Writ of Certiorari and review petitioner's case. First, the Third Circuit misinterprets and misapplies Simpson v. United States, and petitioner is subjected to an additional penalty. * Secondly, Simpson may not have gone far enough to resolve conflicts between the Circuit Courts. There is still ambiguity concerning the overlap between 18 U.S.C. §924(c) and other criminal offenses. This ambiguity relates to whether an additional sentence can be imposed under 18 U.S.C. §924(c) after a defendant has already been convicted of an underlying felony which carries an enhanced penalty. This Court can clarify Simpson and provide uniformity. Finally, in Simpson, this Court left open an unresolved issue of great importance. Resolution of this Double Jeopardy issue is necessary, if petitioner is not entitled to relief on other grounds of statutory construction. Simpson

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* . In Counts 17 and 18 of the indictment under §924(c), petitioner was charged with carrying a firearm in connection with assaults on federal officers and drug conspiracies. However, the trial judge charged the jury that they could convict on this charge if the firearm was used in connection with either offense. The Opinions of the Third Circuit correctly note that it is impossible to determine whether or not the jury concluded that LaRocca used a firearm in connection with both felonies. (Appendix "B", footnote 5; Appendix "C", page 2) For example, the drug conspiracies could have terminated by the time of the "shootout". Since the jury verdict could have been based on the conclusion that the firearm was carried in connection with the assaults alone, it is necessary to determine whether such a conviction and sentence under §924(c) can stand.

holds that where a defendant has been convicted of bank robbery with firearms under 18 U.S.C. §2113(d), which carries an enhanced penalty, and also convicted of using a firearm to commit a felony under 18 U.S.C. §924(c), such defendant may not be sentenced under both. The rationale of Simpson relied upon the legislative history and the language of the bill's sponsor, Representative Poff, as follows:

> "For the sake of legislative history, it should be noted that my substitute is not intended to apply to title 18, sections 111, 112 or 113, which already define the penalties for the use of a firearm in assaulting officials, with sections 2113 or 2114 concerning armed robberies of the mail or banks, with section 2231 concerning armed assaults upon process servers or with chapter 44 which defines other firearm felonies." 114 Cong. Rec. 22232 (1968).

The language states that 18 U.S.C. §924(c) is inapplicable to violations under statutes which already carry an enhanced penalty. Although Simpson involves a bank robbery under 18 U.S.C. §2113(d), the sponsor's language specifically includes assaults on federal officers under 18 U.S.C. §111.

It is still necessary to resolve conflicts between the Circuit Courts either created or left unresolved by Simpson. The Simpson rationale appears similar but not identical to the Sixth Circuit's decision in United States v. Eagle, 539 F.2d 1166 (1976). In Eagle, defendant, an Indian, was convicted of assaulting another Indian on a reservation in violation of 18 U.S.C. §1153, which carried an enhanced penalty, and using a firearm to commit the underlying felony under 18 U.S.C. §924(c). The Eagle Court held defendant could not be sentenced or prosecuted for the §924(c) violation. In several places, Simpson appears to agree with the Eagle rationale. In Simpson, the Court states as follows:

> "We believe that several tools of statutory construction applied to the statutes in a case like the present one -- where the Government relied on the same proof to support the convictions under both statutes -- require the conclusion that Congress cannot be said to

> have authorized the imposition of the additional penalty of §924(c) for commission of bank robbery with firearms already subject to enhanced punishment under §2113(d) . . ." (Citations omitted) Simpson supra 435 U.S. at pp. 12, 13

Again the Court states:

> ". . . to construe the statute to allow the additional sentence authorized by §924(c) to be pyramided upon a sentence already enhanced under §2113(d) would violate the established rule of construction that "ambiguity concerning the ambit of criminal statutes should be resolved in favor or lenity." . . . The legislative history of §924(c) is of course sparse, yet what there is -- particularly Representative Poff's statement and the Committee rejection of the Dominick amendment -- points in the direction of a congressional view that the section was intended to be unavailable in prosecutions for violations of §2113(d). . . ." (Citation omitted) Simpson supra 435 U.S. at pp. 14, 15

Finally,

> " . . . our result is supported by the principle that gives precedence to the terms of the more specific statute where a general statute and a specific statute speak to the same concern, even if the general provision was enacted later . . ." (Citation omitted) Simpson supra 435 U.S. at pp. 15, 16

Thus, the rationale of Simpson, especially the language quoted above, is consistent with Eagle. However, the matter becomes clouded by Simpson's instructions to the Lower Court on remand. The instructions are as follows:

> " . . . Accordingly, we hold that in a prosecution growing out of a single transaction of bank robbery with firearms, a defendant may not be sentenced under both §2113(d) and §924(c). The cases are remanded to the Court of Appeals for proceedings consistent with this opinion . . ." (Citation omitted) Simpson supra 435 U.S. at p. 16

The Third Circuit in the instant case says Simpson rejects Eagle. Petitioner contends that Simpson adopts Eagle. There is need for further clarification.

The Fifth Circuit, in United States v. Nelson, 574 F.2d 277 (1978), decided after Simpson, attempts to interpret Simpson. In Nelson, defendant was convicted of bank robbery under 18 U.S.C. §2113(d) and using a firearm to commit a felony under 18 U.S.C.

§924(c), and concurrent sentences were imposed. Because in Simpson consecutive sentences had been imposed, the Government attempted to argue that the differences in sentencing precluded Simpson's application. The Fifth Circuit disagreed and held that because Simpson made no reference to the distinction between consecutive and concurrent sentences, Nelson was entitled to have his §924(c) conviction vacated.

In Simpson, this Court declined to review the Constitutional question based on the applicability of the Double Jeopardy clause of the Fifth Amendment of the United States Constitution to the instant case. The holding and rationale instead was based exclusively on the statutory interpretation and legislative history of 18 U.S.C. §924(c). As argued in the two preceding arguments, relief can be granted to petitioner based on a statutory interpretation alone; but if this Court does not grant relief on this ground, then it can and should reach the Constitutional question. Here petitioner LaRocca has been subjected to multiple punishment based on two statutes which are not sufficiently distinguishable to permit the imposition of cumulative punishment. Therefore, petitioner, Anthony LaRocca, Jr., respectfully requests that this Honorable Court grant a Writ of Certiorari.

Respectfully submitted,

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